

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





# 77-1083

To be argued by  
MICHAEL Q. CAREY

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1083

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

FRANK JOSEPH FUENTES and  
CARMELLO SANSONE, a/k/a "MICHEL",  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

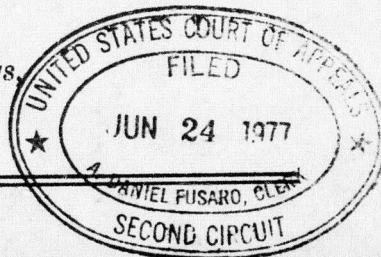
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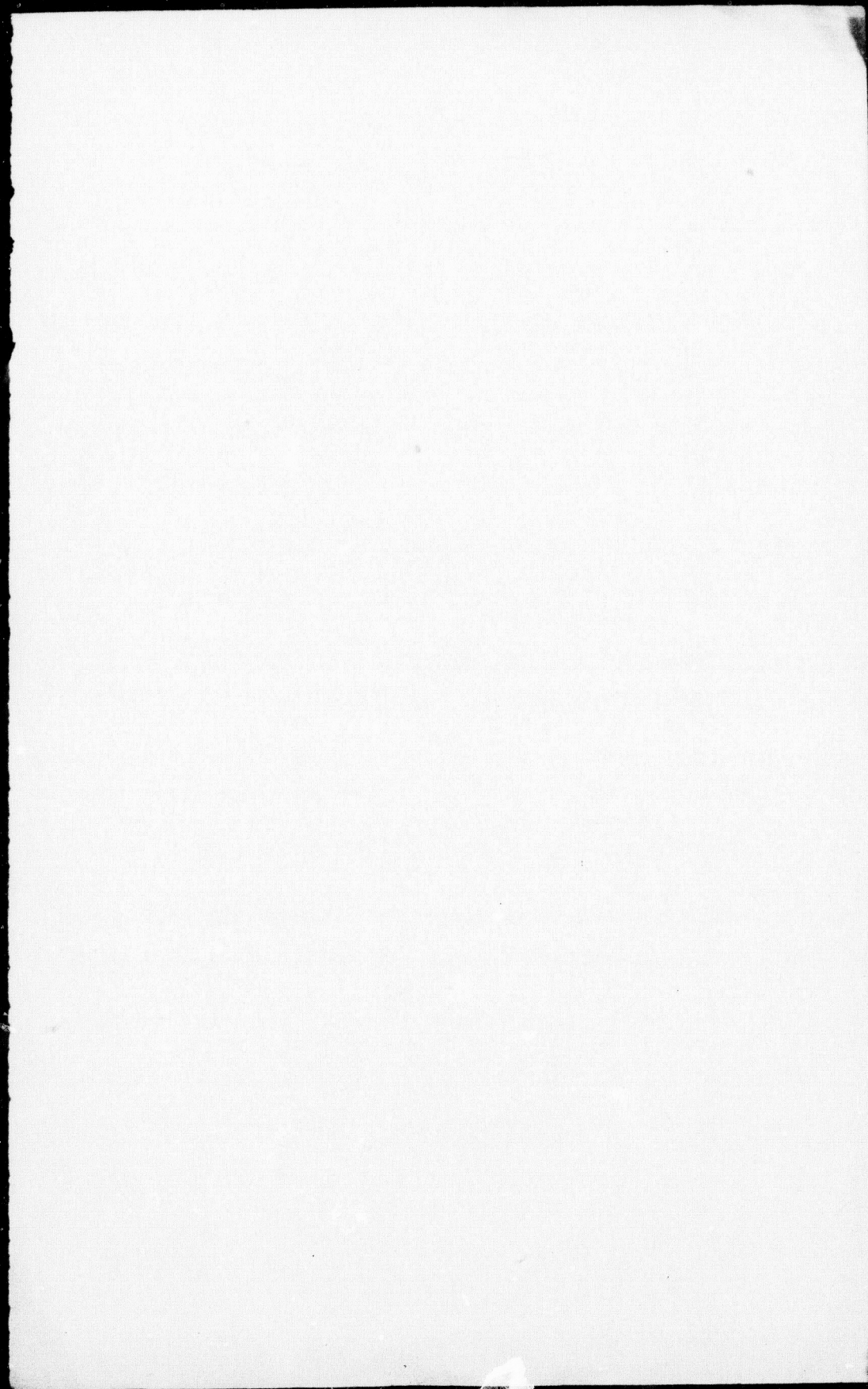
### BRIEF FOR THE UNITED STATES OF AMERICA

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## TABLE OF CONTENTS

|                                                                                                               | PAGE |
|---------------------------------------------------------------------------------------------------------------|------|
| Preliminary Statement .....                                                                                   | 1    |
| Statement of Facts .....                                                                                      | 2    |
| The Government's Case .....                                                                                   | 2    |
| A. A Brief Summary .....                                                                                      | 2    |
| B. A Chronology .....                                                                                         | 3    |
| The Defense Case .....                                                                                        | 6    |
| ARGUMENT:                                                                                                     |      |
| POINT I—The Tape Recordings Were Properly Ad-<br>mitted Into Evidence .....                                   | 7    |
| A. The Facts .....                                                                                            | 7    |
| B. The Authenticity and Reliability of the Tape<br>Recordings Were Demonstrated .....                         | 9    |
| C. Confrontation .....                                                                                        | 12   |
| D. Consent .....                                                                                              | 12   |
| POINT II—The Absence of the Informant Did Not<br>Deprive Sansone of a Fair Trial .....                        | 13   |
| A. Facts .....                                                                                                | 14   |
| B. Surprise .....                                                                                             | 15   |
| C. Right of Confrontation .....                                                                               | 16   |
| D. Non-Production of the Informant .....                                                                      | 17   |
| POINT III—The Court Did Not Have To Charge The<br>Jury On The Voluntariness of Fuentes' Con-<br>fession ..... | 19   |



|                                                                                                                          | PAGE |
|--------------------------------------------------------------------------------------------------------------------------|------|
| POINT IV—Judge Lasker Did Not Abuse His Discretion In Finding That Sansone Was Competent To Communicate in English ..... | 22   |
| CONCLUSION .....                                                                                                         | 25   |

## TABLE OF AUTHORITIES

*Cases:*

|                                                                                                                                          |            |
|------------------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Hampton v. United States</i> , 425 U.S. 484 (1976) ....                                                                               | 18         |
| <i>Roviaro v. United States</i> , 353 U.S. 53 (1957) ....                                                                                | 17         |
| <i>United States v. Armedo-Sarmiento</i> , 545 F.2d 785 (2d Cir. 1976), <i>cert. denied</i> , 97 S. Ct. 1330 (March 7, 1977) .....       | 12         |
| <i>United States v. Barry</i> , 518 F.2d 342 (2d Cir. 1975) .....                                                                        | 19, 20, 21 |
| <i>United States v. Bermudez</i> , 526 F.2d 89 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 970 (1976) .....                           | 12         |
| <i>United States v. Bonanno</i> , 487 F.2d 654 (2d Cir. 1973) .....                                                                      | 13         |
| <i>United States v. Braunig</i> , Dkt. No. 76-6716, slip op. 2773 (2d Cir.), <i>cert. denied</i> , 45 U.S.L.W. 3790 (June 7, 1977) ..... | 10         |
| <i>United States v. Cannone</i> , 528 F.2d 296 (2d Cir. 1975) .....                                                                      | 14, 15     |
| <i>United States v. Cheung Kin Ping</i> , Dkt. No. 76-1362, slip op. 2063 (2d Cir., Feb. 28, 1977) ....                                  | 22         |
| <i>United States v. Chiarizio</i> , 525 F.2d 289 (2d Cir. 1975) .....                                                                    | 10, 11     |
| <i>United States v. Cimino</i> , 321 F.2d 509 (2d Cir. 1963), <i>cert. denied</i> , 375 U.S. 974 (1964) ....                             | 18         |

|                                                                                                            |            |
|------------------------------------------------------------------------------------------------------------|------------|
| <i>United States v. Comulada</i> , 340 F.2d 449 (2d Cir.),<br>cert. denied, 380 U.S. 978 (1965) .....      | 18         |
| <i>United States v. Diop</i> , 546 F.2d 484 (2d Cir.<br>1976) .....                                        | 19, 20     |
| <i>United States v. DiStefano</i> , Dkt. No. 76-1581, slip<br>op. 3539 (2d Cir., May 16, 1977) .....       | 10         |
| <i>United States v. Kaufer</i> , 387 F.2d 17 (2d Cir. 1967) .....                                          | 12         |
| <i>United States v. Knohl</i> , 379 F.2d 427 (2d Cir.<br>1967) .....                                       | 12         |
| <i>United States v. Lavin</i> , 480 F.2d 657 (2d Cir. 1973) .....                                          | 11         |
| <i>United States v. Lubrano</i> , 529 F.2d 633 (2d Cir.<br>1975) .....                                     | 11, 16, 17 |
| <i>United States v. Lucchetti</i> , 533 F.2d 28 (2d Cir.<br>1976) .....                                    | 13, 19     |
| <i>United States v. Manfredonia</i> , 414 F.2d 760 (2d Cir.<br>1969) .....                                 | 17         |
| <i>United States v. Medico</i> , Dkt. No. 76-1426, slip op.<br>3795 (2d Cir., May 25, 1977) .....          | 16         |
| <i>United States v. Montalvo</i> , 271 F.2d 922 (2d Cir.<br>1959), cert. denied, 361 U.S. 961 (1960) ..... | 11         |
| <i>United States v. Natale</i> , 526 F.2d 1160 (2d Cir.<br>1975), cert. denied, 425 U.S. 950 (1976) .....  | 11         |
| <i>United States v. Rollins</i> , 522 F.2d 160 (2d Cir. 1975),<br>cert. denied, 424 U.S. 819 (1976) .....  | 10         |
| <i>United States v. Ruggiero</i> , 472 F.2d 599 (2d Cir.),<br>cert. denied, 412 U.S. 939 (1973) .....      | 17         |
| <i>United States v. Schwartz</i> , 535 F.2d 160 (2d Cir.<br>1976) .....                                    | 10         |

|                                                                       | PAGE |
|-----------------------------------------------------------------------|------|
| <i>United States v. Steinberg</i> , 551 F.2d 510 (2d Cir. 1977) ..... | 11   |
| <i>United States v. Super</i> , 492 F.2d 319 (2d Cir. 1974) .....     | 18   |
| <i>United States v. Weiser</i> , 428 F.2d 932 (2d Cir. 1969) .....    | 12   |
| <i>United States v. White</i> , 401 U.S. 745 (1971) .....             | 13   |

## OTHER AUTHORITIES

|                         |    |
|-------------------------|----|
| F.R. Evid. 804 .....    | 16 |
| F.R. Evid. 901(a) ..... | 10 |



# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 77-1083

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UNITED STATES OF AMERICA,

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—v.—

FRANK JOSEPH FUENTES and  
CARMELLO SANSONE, a/k/a "Michel",  
*Defendants-Appellants.*

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## BRIEF FOR THE UNITED STATES OF AMERICA

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### Preliminary Statement

Frank Joseph Fuentes and Carmello Sansone, a/k/a "Michel", appeal from judgments of conviction entered January 17, 1977, in the United States District Court for the Southern District of New York after a seven day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 76 Cr. 835, filed August 27, 1976 in two counts, charged that on or about June 4, 1976, Fuentes and Sansone possessed with the intent to distribute and distributed approximately one-half kilogram of cocaine, and conspired to do so, in violation of Title 21, United States Code, Sections 812, 841 and 846.

Trial commenced November 9, 1976, and on November 22, 1976, the jury returned verdicts of guilty against

Sansone on Counts One and Two and against Fuentes on Count One.\*

On January 17, 1977, Judge Lasker sentenced Sansone to ten years imprisonment each on Counts One and Two, the sentences to be served concurrently, to be followed by six years special parole. On the same date Judge Lasker sentenced Fuentes on Count One to seven years imprisonment, to be followed by six years special parole.\*\*

Each appellant is currently serving the sentence imposed by the District Court.

### **Statement of Facts**

#### **The Government's Case**

##### **A. A Brief Summary**

For a period of less than a month, between May 27, 1976 and June 18, 1976, Sansone and Fuentes negotiated with, and agreed to sell narcotics to, a Government informant and William Schnakenberg, a Special Agent of the Drug Enforcement Administration who was then acting in an undercover role as a narcotics buyer. Pursuant

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\* At the conclusion of the Government's case, Fuentes moved for a directed verdict of acquittal pursuant to Rule 29, F.R. Crim. P., on Counts One and Two. His motion was denied as to Count One but was granted, without opposition by the Government, as to Count Two (Tr. 905).

Citations to "Tr." refer to pages in the trial transcript, citations to "GX" refer to Government's Exhibits.

\*\* The maximum possible sentence to which each defendant was subject was enhanced because of prior narcotics convictions of each, concerning which the Government had filed a second offender information pursuant to 21 U.S.C. § 851.



to these negotiations, on June 4, 1976, the informant and Schnakenberg received approximately one-half kilogram of cocaine. In addition, before and after the June 4th sale, small samples of cocaine were delivered to Schnakenberg. However, the only direct delivery of cocaine to Schnakenberg by either of the defendants was made on June 18, 1976 when Sansone personally delivered a sample of cocaine. Each of the other deliveries of cocaine was made through the informant.

The Government's proof consisted of the testimony of Schnakenberg and several of his fellow agents who made surveillances of each defendant during the negotiations. In addition, the Government introduced into evidence a series of consent recordings made by the informant. However, the informant himself never testified since he had disappeared approximately one month before the trial commenced.

## **B. A Chronology**

On May 27, 1976, the informant, who was known to the agents as "Hugo", met Sansone in midtown Manhattan on the West side and, in a recorded conversation, reassured Sansone that Schnakenberg could be trusted in narcotics negotiations. Hugo also told Sansone that Schnakenberg wanted to purchase as much as ten kilograms of cocaine, but first wanted a sample; if the sample was of the quality he was seeking, he would then purchase a half kilogram of cocaine. Sansone agreed to deliver the cocaine but emphasized that he did not want to meet Schnakenberg. The conversation ended with Hugo telling Sansone he would determine if Schnakenberg would authorize the informant to receive the cocaine. (GX 2C). Later that day, Hugo met Sansone and Fuentes and had a conversation with them. However, the second conversation was not recorded.

The sample requested on May 27 was delivered the next day. Hugo met Sansone and Fuentes in the early evening of May 28, 1976, in the vicinity of 44th Street and 9th Avenue in Manhattan, had an unrecorded conversation, and Fuentes passed to Hugo a matchbook containing a sample of cocaine. (Tr. 310-13, 337, 441). Hugo then delivered the sample to Schnakenberg who was waiting in a nearby bar. Schnakenberg instructed Hugo to tell Sansone and Fuentes that he had \$20,000 in cash with him and that he was prepared then to purchase the half kilogram. Negotiations extended over a period of two hours afterwards but ended in a deadlock over Schnakenberg's insistence upon making the purchase only if he personally could meet Sansone to make the payment and receive the cocaine. (Tr. 52; GX 3).

On June 1, 1976, Hugo again met with Sansone and Fuentes and had a recorded conversation. Hugo carried \$20,000 to purchase the half kilogram of cocaine, but Sansone and Fuentes spotted the surveillance following them and aborted the delivery of the half-kilogram. (GX 2C). However, before the sale was cancelled, Fuentes did leave the car to get the package of cocaine, entering 601 W. 110th Street in Manhattan, an apartment from which, on June 18, 1976, Sansone obtained a sample of cocaine he delivered to Schnakenberg. (Tr. 377-39, 369-70, 443; GX 5C).

The attempt to obtain the half-kilogram of cocaine continued on June 2, 1976. Hugo and Sansone drove around for hours continuously trying to detect if they were being followed. Once again the delivery was aborted. (Tr. 458-59; GX 6B).

The repeated meetings between Sansone, Fuentes and Hugo apparently developed some confidence in Sansone that Hugo and Schnakenberg were legitimate drug dealers and, on June 3, 1976, Sansone allowed Hugo to introduce



him to Schnakenberg. Schnakenberg and Sansone then had a lengthy recorded conversation, their first, at the end of which Sansone promised that the delivery of the half-kilogram of cocaine would be made that day. (Tr. 97-100; GX 9B). However, once again the delivery was not made.

Finally, on June 4, 1976, Schnakenberg and Hugo met Sansone and again agreed on the delivery of the half-kilogram of cocaine. At Sansone's direction, Schnakenberg gave Hugo the \$20,000 purchase money and Hugo and Sansone drove uptown. About two hours later, Hugo returned and delivered the half-kilogram to Schnakenberg. (Tr. 112-16).

One week later, Schnakenberg and Sansone met and discussed the poor quality of the one-half kilogram delivered on June 4. To appease Schnakenberg, Sansone agreed to provide him with a free make-up package of cocaine. That matter settled, Sansone announced he had more cocaine to sell at \$40,000 per kilogram and they discussed the possibility of a sale of five kilograms. (Tr. 124-27).

On June 15 and 16, 1976, Sansone and Schnakenberg discussed the promised delivery of the make-up package. On the 15th, Sansone first mentioned he could also supply French heroin. On the 16th, Sansone said he had a new supply of cocaine, which he would sell at \$44,000 per kilogram. (Tr. 133, 134).

On June 17 and 18, 1976, the meetings between Sansone and Schnakenberg came to a conclusion. On the 17th, Schnakenberg agreed to take a sample of the new cocaine Sansone had received and planned to meet Sansone on June 18 to receive it. On the 18th, Sansone delivered a small sample of cocaine to Schnakenberg after entering an apartment at 601 W. 110th Street—the same

address to which Fuentes was followed on June 1, 1976 in one of the first attempts to deliver the half-kilogram of cocaine. Later that day, when Schnakenberg told Sansone he did not like the quality of the new cocaine and that he would not purchase any more, Sansone tried to reassure him of its purity by stating that he himself had taken the sample from a three kilogram package. (Tr. 138).

Fuentes and Sansone were arrested on August 18, 1976. Fuentes admitted he had spotted two of the arresting agents on surveillance during the negotiations in May and June and also admitted he had surveilled the DEA headquarters through binoculars from the roof of an adjoining building a couple of weeks previously because in his business he had to be aware of what was going on. Sansone took a different tack after his arrest. At first, he denied knowing Schnakenberg. Later, however, he admitted knowing Schnakenberg, but only as a friend of Hugo. In addition, he denied ever discussing narcotics with Hugo, denied ever being in an automobile with Schnakenberg, and said that if he had been recorded, the tapes would indicate he said he never wanted to deal in narcotics. (Tr. 426, 463-72, 453).

### **The Defense Case**

Neither defendant testified in his own behalf and Sansone was the only defendant to offer any defense. He called an interpreter to testify to the length of a particular consent recording but withdrew the interpreter's testimony after learning his offer was based on a mistaken interpretation of the facts. (Tr. 759). In addition, Sansone put into evidence portions of consent recordings which the Government had declined to offer in evidence. Sansone Ex. H was a transcript which consisted of virtually all those portions of the consent record-



ing of June 2, 1976 (GX 6) which the Government had not offered. Sansone Ex. I was a redacted transcript of page 20 of the transcript of the consent recording of May 27, 1976. (GX 2C). The Government declined to play the original transcript of page 20 because it contained a reference to a 12 year term of imprisonment served by Sansone. Over the Government's objection, however, the Court admitted Sansone Ex. I, redacted to omit the reference to Sansone's imprisonment. Page 20, which also contained statements by Hugo that he had served time in prison, was received as evidence to impeach Hugo's character and credibility over the Government's objection that the character and credibility of the informant were not in issue.

## **ARGUMENT**

### **POINT I**

#### **The Tape Recordings Were Properly Admitted Into Evidence**

Both Fuentes and Sansone make various claims concerning the admissibility of all or some of the four tape recordings admitted into evidence at trial. With respect to certain of these claims, the appellants simply neglect to inform the Court that they either acquiesced in or actively sought the admission of the tapes, thus waiving any issue on appeal. At any rate, all of the claims are wholly baseless.

#### **A. The facts**

There were four tape recordings admitted into evidence at trial. These tapes in general reflected conversations between the informant Hugo and the defendants,

although in one a conversation between Sansone and agent Schnakenberg appears as well. The procedures by which these tapes were made and retained were as follows:

On May 27, 1976, a Nagra recorder was placed on Hugo's body and thereafter he met with Sansone under surveillance of DEA agents. When the meeting was completed, the recorder and tape were removed from Hugo's body and the tape was placed in a heat-sealed evidence envelope which was initialled and dated. (Tr. 38-40, 308, 363-64).

On June 1, 1976, both a Kel transmitter and a Nagra recorder were placed into an undercover vehicle used by Hugo. (Tr. 606). Hugo then met with Sansone and Schnakenberg under surveillance of D.E.A. agents and, when the meeting was completed, the tapes were placed in heat-sealed evidence envelopes, which were initialed and dated. (Tr. 79-81). The Kel receiver, which was paired to the Kel transmitter, was in a nearby vehicle driven by one of the surveillance officers. (Tr. 443-44).

On June 2 and 3, 1976, the same procedures were employed as on June 1 for making and preserving the recordings. (Tr. 86, 87, 91, 95, 96, 101, 103).

The tape of May 27, 1976 was introduced into evidence and played to the jury before any objection was made. (Tr. 41). Thereafter, before the remaining tapes were offered into evidence, Fuentes objected to the admission of each tape but that of June 1 on the ground that he had not had the chance to confront Hugo. (Tr. 455, 557). Judge Lasker overruled his objection on this ground. (Tr. 509-10). In addition, Sansone moved to suppress all the tapes except that of June 3 on the ground that the Government had not demonstrated con-



sent on the part of Hugo. (Tr. 580). As a result, and even though the motion was untimely with respect to the May 27 tape already in evidence, Judge Lasker conducted a hearing on the issue of consent, at the end of which he denied the motion. (Tr. 605-634).

The court then admitted into evidence, without any objection, the tapes of June 2 and 3, 1976. (Tr. 635, 672). Finally, the June 1 tape was received in evidence over the renewed objection of Sansone that it was inadmissible because the Government had not shown Hugo's consent. (Tr. 683).

After the Government rested, both defendants raised the further claim that since Hugo was not called as a Government witness, the admission of the tape recordings violated their rights to confrontation. (Tr. 700, 703). This motion to strike the tapes was also denied. (Tr. 702).

#### **B. The authenticity and reliability of the tape recordings were demonstrated**

Fuentes now claims that there was an insufficient showing of the authenticity and general accuracy of the tape recordings and that they should thus have been excluded from evidence. While he engages in a lengthy discussion in his brief to this Court of his present view of the inadequacies of the Government's showing and asserts that the tapes themselves contained intrinsic evidence of unreliability (Brief at 15-23), he simply did not raise this asserted bar to admissibility before the District Court, which had an opportunity not only to assess the completeness of the procedures used but heard the tapes played in Court.\* Indeed, Fuentes told Judge Lasker dur-

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\* The tape of June 1 was not played at the request of the Court and with the consent of all counsel (Tr. 697).



ing trial that he was only interested in the June 1 tape (Tr. 422) and not only that he had no objection to it (Tr. 562) but that he was willing to allow its introduction into evidence without ever playing it. (Tr. 697). This failure to object at a time when the factual underpinnings for an objection were apparent clearly precludes raising the claim on appeal. As the Court has recently noted,

The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), and where that party has had ample opportunity to make the point in the trial court in a timely manner, *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 819 (1976), waiver will bar raising the issue on appeal.

*United States v. Braunig*, Dkt. No. 76-6716, slip op. 2773, 2779-80 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 7, 1977); see also *United States v. DiStefano*, Dkt. No. 76-1581, slip op. 3539, 3548 n.5 (2d Cir., May 16, 1977). See also *United States v. Chiarizio*, 525 F.2d 289, 293 (2d Cir. 1975).

At any rate, even if Fuentes had opposed admissibility of the tape recordings on the ground now raised, his argument is nonetheless utterly without merit. The test for the admissibility of such evidence is the common sense one set out in F. R. Evid. 901(a), that is, whether there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." In this case, the tape recorder was carefully placed on the informant or in his vehicle and later the tapes were taken from him or the vehicle after he had had contact

under surveillance with either or both of the defendants.\* In others, the tape was a recording of a transmission of a conversation between Hugo and the defendants; since the supervising agent carefully recorded the transmission and initialed the sealed evidence envelope into which the tape was placed, the authenticity of the tape was assured.\*\*

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\* In *United States v. Lubrano*, 529 F.2d 633 (2d Cir. 1975), this Court found sufficient to support a verdict of guilty the evidence that an informant, who was, like Hugo, unavailable to testify at trial, met with the defendant and afterward gave surveilling agents a package of narcotics. It must surely follow *a fortiori* that similar evidence would suffice to meet the Government's much lower burden of proof concerning the admissibility of evidence.

Fuentes makes the additional argument that since there is no evidence that Hugo did not turn the Nagra recorder off during his conversation with Fuentes, the tape was inadmissible. (Brief at 21). While this is true, it is equally true that there is no evidence that Hugo did so; as this Court has noted, in the absence of such a showing, the maintenance of reasonable procedures is a sufficient foundation for authenticity. *United States v. Chiarizio*, *supra*, 525 F.2d at 296; *United States v. Lavin*, 480 F.2d 657, 662-63 (2d Cir. 1973); *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Montalvo*, 271 F.2d 922, 925 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). In addition, such speculation of manipulation by Hugo are fanciful in the extreme. First, it is difficult to imagine how one could effectively change the character of a running conversation by turning a machine on and off, without such attempts being immediately obvious. Further, his situation was an intrinsically perilous one. Had he been observed reaching into his under-garments and creating a "click" during a conversation in which his interlocutors were making incriminating statements he would needlessly have subjected himself to great risk. This was surely additional circumstantial evidence of authenticity. Finally, of course, the defendants were free to make all the arguments they wished to the jury about the weight to be given to the tapes—and indeed the record reveals that they chose to do so rather than challenging the admissibility before the judge.

\*\* The fact that Agent Pavlick did not hear all of the conversation that he recorded (Fuentes brief at 19) is obviously irrelevant, since he testified to and was cross-examined about the *procedures* he used, which obviously demonstrated that the tape introduced into evidence represented what was said and heard by Hugo. See *United States v. Steinberg*, 551 F.2d 510, 515 (2d Cir. 1977).



In short, there was ample evidence to demonstrate the trustworthiness of the tape recordings.\*

### C. Confrontation

Fuentes claims that admission into evidence of a transcript of the final portion of the June 1 tape recording, in which Hugo talked with agents not in the presence of the defendants, was erroneous. He neglects to inform the Court that this transcript was not offered into evidence by the Government, but only at the request—indeed, the repeated request—of Fuentes. (Tr. 559, 562, 569, 571, 586 and 684). As such, he can hardly complain on appeal. *United States v. Arredo-Sarmiento*, 545 F.2d 785, 795 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1330-31 (March 7, 1977). Furthermore, he never requested any limiting instruction, thus precluding his claim of error on appeal. *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976), and cases there cited. Finally, that portion of the transcript does not mention narcotics, and was not incriminating anyway.

### D. Consent

Sansone argues, as he did in the District Court, that there was insufficient showing of Hugo's consent to render

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\* Scattergun attacks by Fuentes on the audibility of the tape recordings are frivolous. As this Court has held on numerous occasions, such a determination is left to the discretion of the District Court: furthermore, "[t]hat some portions of the tapes were inaudible does not necessarily render the entire conversation inadmissible . . . ." *United States v. Weiser*, 428 F.2d 932, 937 (2d Cir. 1969); see also *United States v. Kaufer*, 387 F.2d 17, 19 (2d Cir. 1967); *United States v. Knohl*, 379 F.2d 427, 440 (2d Cir. 1967).



the tape recordings admissible into evidence.\* Initially, it should be noted that the assertion is preposterous on its face: it is simply inconceivable that Hugo would have worn a Nagra or a Kel device, at some discomfort and considerable risk to himself, without his consent.\*\* Indeed, it was the forcefully articulated position of the defendants in the District Court that Hugo actively manipulated the recording devices to his own ends. (Tr. 800, 832-33). In addition, Judge Lasker held a mid-trial hearing on the issue of consent (Tr. 605-34), during which the precise details of Hugo's consent was demonstrated. His conclusion that the recording was consensual was far from "clearly erroneous." *United States v. Lucchetti*, 533 F.2d 28, 36 (2d Cir. 1976).

## POINT II

### **The Absence of the Informant Did Not Deprive Sansone of a Fair Trial**

Sansone makes several disjointed arguments all based upon the fact that several weeks prior to trial, the informant Hugo disappeared. All of Sansone's claims are without merit, but must be placed in factual context in order to be understood fully.

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\* He appears to concede, as he must, that Hugo's consent sufficed to obviate any Fourth Amendment interest. *United States v. White*, 401 U.S. 745 (1971).

\*\* In *United States v. Bonanno*, 487 F.2d 654, 658-59 (2d Cir. 1973), this Court noted that "[i]t will normally suffice [to prove consent] for the government to show that the informer went ahead with a call after knowing what the law enforcement officers were about." In this case, the Government showed far more than that.

## A. Facts

As indicated in the statement of facts, the informant Hugo was active in various phases of the case against Sansone. This was quite clear to Sansone at least as early as the date of his arrest on August 18, 1976, when he was told by agents that they had recorded conversations between him and Hugo. (Tr. 465). It became increasingly clear when copies of the recordings were made available to his counsel, and indeed his attorney acknowledged knowing the identity of the informant as early as October 28, 1976. (Tr. 582).

Prior to trial, Judge Lasker, exercising discretion accorded him by *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1975), ordered the Government to provide the defense with a witness list, and on November 5, 1976, the Government turned over to the defense a list of 31 individuals as "potential" witnesses for the Government.\* Even earlier, however, and in an effort not to compromise the security of potential witnesses, the Government had offered to make potential witnesses available to defense counsel for interviewing, rather than making their addresses known. (Tr. 859-62). At no time did any defendant request such an interview.\*\*

Several days prior to the end of the Government's case, the prosecutor announced that Hugo had disappeared and, despite a diligent effort to find him in the hope and expectation that he would testify, the Government could not locate him. (Tr. 455). Judge Lasker explicitly

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\* Of these, only nine testified for the Government.

\*\* Indeed, counsel did not even request names and addresses of the Government's potential witnesses until two weeks before the trial began and at that time the informant's whereabouts were unknown. Thus, the Government received no indication that Sansone might be interested in the identity and location of the informant until after the informant had disappeared.



offered to hold a hearing on the availability of the informant and the extent of the Government's efforts to find him; nonetheless, neither defendant requested such a hearing, (Tr. 455-56, 499-500, 505), and Sansone later argued to the jury that he had run away. (Tr. 821).<sup>\*</sup> Finally, in cross-examining Government witnesses, Sansone never asked any questions about the availability of the informant.

## B. Surprise

Sansone's claim that he relied upon the Government's letter written in response to Judge Lasker's order under *United States v. Cannone*, *supra*, and was thus unfairly surprised, is fanciful. First, the letter obviously was not intended as a statement that the informant would testify. The purpose of disclosure of witness lists is to allow the defense to interview such witnesses and seek information about them in an effort to prepare for trial. *United States v. Cannone*, *supra*, 528 F.2d at 301. The doctrine obviously does not serve as a requirement that the Government call all such witnesses, and just as obviously it is in keeping with the spirit of *Cannone* for such a witness list to be as all-inclusive as possible. Sansone's present claim of surprise is frivolous. No defense lawyer ever attempted to locate or interview Hugo or availed himself of the Government's offer to make him available. Moreover, the defense acquiesced in the Government's explanation concerning Hugo's disappearance without accepting the Court's offer of a hearing and

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<sup>\*</sup> Sansone's present claim that he "demanded to know what procedures were initiated by the Government in order to locate" Hugo and that he moved for a mistrial because of the Government's failure to locate him (Brief at 18) is fiction. After the Government rested its case, however, Sansone did move unsuccessfully to strike the tapes because of Hugo's absence. (Tr. 699).



without asking for a continuance. Cf, *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3807 (2d Cir., May 25, 1977).<sup>\*</sup> Finally, while Sansone quotes a portion of his opening statement in which he responded to the Government's opening statement (Brief at 16), he does not indicate that while the prosecutor's opening outlined how the Government would prove its case, including the names of witnesses, it did not mention Hugo. (Tr. 9-10).

### C. Right of Confrontation

Sansone appears to argue that the Government's proof at trial, coupled with the absence of the informant, deprived him of his right of confrontation. While confused, his assertion seems to be that since Hugo's involvement in the defendant's actions was so great, the Government could not prove those actions without calling Hugo. This argument is frivolous in light of this Court's decision in *United States v. Lubrano*, *supra*. In that case, virtually the entirety of the Government's case consisted of testimony of law enforcement agents that they observed the informant meet with the defendant and come away with narcotics. The informant did not testify. This Court held that while the agents did not themselves have first-hand knowledge of the defendant's narcotics activities, their observations of the informant's actions nonetheless sufficed to support conviction even though there were numerous other innocent inferences that could be drawn from the evidence. 529 F.2d at 636. The Court also upheld the admissibility of several statements made by

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<sup>\*</sup> In *Medico*, this Court found sufficient for purposes of demonstrating unavailability under F. R. Evid. 804 the Government's recitation of its effort to find a potential witness and the fact that no defendant accepted the trial judge's offer of a continuance.

the agents to the informant—even though there was no limiting instruction given by the trial court—on the ground that such statements were “relevant to aid the jury in understanding the background events leading up to the crimes in question.” *Id.* at 637. See also *United States v. Ruggiero*, 472 F.2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Manfredonia*, 414 F.2d 760, 765 (2d Cir. 1969). This case surely follows *a fortiori* from *Lubrano*. Here, the jury not only had observations of various agents about defendants’ movements, but had tapes or transcripts of all but a small portion of the meetings between Hugo and the defendants. The tapes and transcripts gave the jury an actual log of the precise interchange between the defendants and Hugo. Far from allowing the kind of speculation found permissible in *Lubrano*, this case gave the jury a clear demonstration of the precise events underlying the crime. Furthermore, the statements of Hugo appearing on the tape were clearly admissible under *Lubrano*, since they quite obviously were not admitted for the truth of the matter in them, as the prosecutor emphasized in summation. (Tr. 794). It follows that the claim is frivolous.

#### D. Non-Production of the Informant

Sansone also claims that since the informant Hugo would be key to his defense of entrapment, his conviction should be reversed because of the failure of the Government to produce him.\* This argument simply ignores the relevant facts. First, Sansone never indicated at

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\* He does not—and cannot—argue that he was unaware at all relevant times of Hugo’s identity, and it is clear that he knew Hugo was the informant at least since the time of his arrest. Thus, this is not a case like *Roviaro v. United States*, 353 U.S. 53 (1957) and its numerous progeny where the Government has asserted a privilege as to the identity of an informant.



trial that he intended to call Hugo to prove entrapment. Not only did he state before he was expressly notified of Hugo's absence that he was not sure whether he would raise an entrapment defense (Tr. 223-24, 229, 358, 360, 421), but thereafter he never said anything to indicate that the informant's absence would affect that decision. (Tr. 710, 735). Furthermore, he consistently declared that he would base his entrapment defense, if any, on the transcripts of the conversations between the informant and himself. (Tr. 321, 735-36, 812-13, 819). Finally, of course, Hugo was in fact not available, as the Government demonstrated at trial by a recitation that was not challenged then and is not factually opposed on appeal. It follows that there was no error. *United States v. Super*, 492 F.2d 319, 321 (2d Cir. 1974); *United States v. Cimino*, 321 F.2d 509, 512 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964).<sup>\*</sup> In short, Sansone has attempted to create a legal windfall from an event that actually benefitted him at trial. As this Court stated in *United States v. Comulada*, 340 F.2d 449, 453 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965).

"We note that in case after case, in appeals from convictions for trafficking in narcotics, we hear arguments regarding the government's failure to call the informer or special employee. [Citations omitted]. It seems to be defense strategy to bring out facts from which it can be argued that the government or the court should have called the informer as a witness. Almost never is there a genuine effort to find the witness or to call him even when it is certain that he

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<sup>\*</sup> Sansone's additional claim that the Government's conduct with respect to the informant was "so outrageous that due process principles absolutely barred the government from prosecuting the defendant", Brief at 21, is frivolous in light of the Supreme Court's decision in *Hampton v. United States*, 425 U.S. 484 (1976).



is available and subject to process. . . . We think that this is another such case."

### POINT III

#### The Court Did Not Have To Charge The Jury On The Voluntariness of Fuentes' Confession

Fuentes argues that an issue of the voluntariness of his confession was raised during the trial and that Judge Lasker's failure to instruct the jury on the issue was reversible error even though he neither requested such a charge nor objected to Judge Lasker's failure to give such a charge. His argument has no merit. An instruction of the kind required by 18 U.S.C. § 3501 is required only where an issue of voluntariness has been raised and none was raised here. *United States v. Diop*, 546 F.2d 484, 486 (2d Cir. 1976); *United States v. Lucchetti*, 533 F.2d 28, 39 (2d Cir. 1976); *United States v. Barry*, 518 F.2d 342, 346 (2d Cir. 1975).

During the trial, the Government offered in evidence the advice of rights card from which the agents advised Fuentes before he volunteered the statements in question. (GX 17).<sup>\*</sup> Fuentes objected to its introduction, stating: "I don't think it serves any purpose. It is not an issue before this jury." (Tr. 431). Judge Lasker

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<sup>\*</sup> Following his arrest, Fuentes said that he recognized two of the arresting agents from the street whom he had spotted following him, that a couple weeks previously, he placed himself on the rooftop of a building near the New York City headquarters of the Drug Enforcement Administration where he surveilled agents and their vehicles through binoculars in order to keep himself apprised of what was going on in his business and that, even though he had spotted agents following him, he went through with the deal because he had to take a chance. (Tr. 426, 469-472).

received the rights card in evidence but only on the condition that an issue of voluntariness should thereafter be raised. (Tr. 431). Since no such issue was ever raised before the jury and no reference was ever again made to the rights card, Judge Lasker did not commit plain error in failing to give a jury charge on voluntariness. *United States v. Diop, supra*, 546 F.2d at 486-87.

Fuentes did not raise the issue of voluntariness in his opening remarks to the jury. Thereafter, before the jury, he waived cross-examination of two agents who testified to Fuentes' post-arrest admissions (Tr. 426, 431) and nothing in his cross-examination of the only other agent to testify to such admissions related to the question of voluntariness. (Tr. 498). Thus, Fuentes' action was a far cry from that in *United States v. Barry, supra*, where the defendant "claimed that the statements had been extracted by means of verbal threats and physical intimidation," *United States v. Diop, supra*, 546 F.2d at 486. Moreover, Fuentes himself did not testify. Finally, counsel argued in summation not that the statement was coerced or involuntary, but that the testimony of the Government's witnesses concerning the statements of Fuentes was fabricated. (Tr. 805-08). Fuentes thus avoided the issue of voluntariness in his summation apparently because of "its possible dilution of the claim that the admissions had not been made." *United States v. Diop, supra*, 546 F.2d at 487.

Nevertheless, even if the issue of voluntariness was raised Fuentes' conviction should not be reversed because he has failed to show how Judge Lasker's failure to give a proper charge prejudiced him. *United States v. Barry, supra*, 518 F.2d at 348.

None of Fuentes' post-arrest statements by itself was incriminating. Indeed, the inculpatory significance of



the admissions was apparent only if the jury believed, as a result of the balance of the proof against Fuentes, that he was in the business of distributing narcotics. Fuentes relies upon *United States v. Barry*, in which this Court observed that "aside from the confession, the only proof that Barry played a part in these transactions was the testimony of Thomas who was awaiting sentence on drug charges, and who alone had face-to-face dealings with Barry," and that the testimony of surveillance agents was inconclusive. *United States v. Barry, supra*, 518 F.2d at 348. Clearly, the Government's proof against Fuentes, without the statements, was far more incriminating and far more reliable than that in *Barry*. Indeed, that proof established no explanation for the association between the informant Hugo and Sansone other than the distribution of substantial quantities of narcotics. It was in this context that surveillance agents saw Fuentes meeting with the informant and Sansone on May 27 and 28, 1976. (Tr. 309-11, 439). In addition, on May 28, 1976, Fuentes was observed passing to the informant in Sansone's presence a matchbook containing a sample of cocaine that on the previous day, in a recorded conversation (GX 2C), Sansone had agreed to supply to the informant. (Tr. 52, 265, 272, 310-13, 318, 337, 441). The recorded conversation of May 27 between Sansone and Hugo also recorded Sansone's intention to supply a half kilogram of cocaine for \$20,000 (GX 2C). On May 28, Sansone refused to deliver the half kilogram of cocaine on the terms insisted upon by the undercover agent, Schnakenberg, but, on June 1, 1976, a second attempt was made to purchase the half kilogram of cocaine. (Tr. 56, 78). A recorded conversation of June 1, made while Fuentes, Sansone and the informant were in the latter's car, indicated Fuentes' full knowledge of and partial control over the intended narcotics transaction and where it was to occur. Later, Fuentes left the car by himself to pick up the cocaine and was followed to 601 W. 110th



Street, the apartment building from which Sansone was to obtain a sample of cocaine he personally delivered to the undercover agent on June 18, 1976. Fuentes returned to the automobile only to tell the informant that the "merchandise" was not available then (GX 5C) when, in fact, as Sansone revealed the following day, Fuentes had substantial control of the narcotics delivery and had purposely declined to deliver the cocaine because he had spotted what he believed were agents on surveillance. (GX 6A). Thus, the proof of Fuentes' guilt was wholly independent of his post-arrest admissions. *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2076-77 (2d Cir., Feb. 28, 1977) (Court need not reach question of admissibility of *incriminating* confession in light of independent evidence).

#### POINT IV

##### **Judge Lasker Did Not Abuse His Discretion In Finding That Sansone Was Competent To Communicate In English**

Without specifying any remedy to correct the alleged wrong, Sansone argues that his constitutional rights were violated in relation to a post-trial competency examination. Specifically, he argues that the psychiatrist who performed the examination was not qualified to examine him because he was not qualified to conduct the examination in Italian or French.\* The question for this Court raised by Sansone's argument is simply whether Judge Lasker abused his discretion in finding that the defendant was competent to communicate in English with the psychiatrist. Clearly, Judge Lasker ruled properly.

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\* Sansone has never attacked the professional qualifications of the psychiatrist who found him competent.

The issue of competency was not raised by the defendant until after the prosecution and defense had rested their respective cases and it was raised not by Sansone in conversations with his attorney during the preparation and conduct of the trial, but as the result of a phone call in which Sansone's co-defendant, Fuentes, said he believed Sansone was incompetent to stand trial. Counsel for Sansone has admitted that he did not then take the message seriously and reiterated in a letter to Judge Lasker setting forth these facts, that he believed Sansone was competent to stand trial. Nevertheless, Sansone's counsel requested an examination stating he would accept the appointment of any doctor the court might choose. (Letter dated November 19, 1976). At that time, he made no demand for the court to appoint a psychiatrist who could examine Sansone in Italian or French. Thereafter, on December 2, 1976, Judge Lasker signed an order for a competency examination of Sansone.

However, on December 16, 1976, Sansone made a second motion for a competency examination, formally requesting the Court to appoint a French-or Italian-speaking psychiatrist. He supported his motion by noting that interpreters had been appointed to translate for Sansone and by stating that he had difficulty in the past communicating with Sansone.\*

On December 24, 1976, the psychiatrist appointed by the court reported the results of his examination of Sansone. Not only did he find that Sansone was competent but he also stated that Sansone's memory for recent and remote events was apparently unimpaired and that,

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\* Since counsel for Sansone had stated in his letter of November 19th that he believed his client was competent, apparently he intended this remark only to indicate the presence of a partial language barrier.



though the doctor "strongly suspected that there may be volitional components through which Mr. Sansone attempts to make himself less understood than is necessary," it was the doctor's professional opinion that Sansone had an adequate knowledge and appreciation of the charges against him and could confer with counsel in his own defense. The scope of the psychiatric report itself, setting forth facts learned during an interview of Sansone, confirms that the defendant was quite competent to communicate with the psychiatrist in English. Nothing said by Sansone's counsel in a letter to the Court dated December 30, 1976, commenting on the psychiatric report, would suggest a different interpretation. Finally, at the time of sentencing, Judge Lasker formally denied Sansone's December 16th motion for a psychiatric examination in French or Italian, observing that the examining psychiatrist not only found Sansone competent but also found no reason to believe that Sansone did not understand the questions put to him. Judge Lasker then ruled that he found no basis for conducting another examination. (January 17, 1977 transcript at 7).

The evidence available to Judge Lasker at the time of his ruling which demonstrated that Sansone could communicate in English was overwhelming. During the trial, Judge Lasker heard a lengthy tape recording in which Sansone had a conversation in English. (GX 6 & 9; Tr. 636). Furthermore, there was evidence at the trial that Sansone had approximately ten conversations with Schnakenberg in English in which they discussed delicate narcotics negotiations involving directions to Schnakenberg, and dates, times and locations for meetings as well as prices, quantities and qualities of the narcotics. (Tr. 104, 106, 113, 124, 127, 133, 134, 135, 138). In addition, an arresting officer testified during trial that at the time of Sansone's arrest, he advised Sansone of his rights in English and Sansone replied that he understood



them. (Tr. 462). Finally, as discussed above, Judge Lasker had read the report of the psychiatrist, which indicated he had conducted a lengthy and detailed interview of Sansone in English on the basis of which he was able to judge the defendant competent.

### CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

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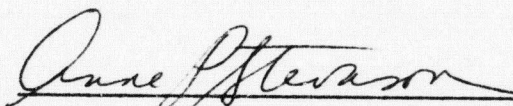
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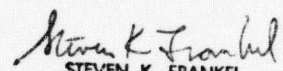
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STEVEN K. FRANKEL  
Notary Public, State of New York  
No. 24-4607105  
Qualified in Kings County  
Commission Expires March 30, 1979



